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Nos. ~~658~~ and ~~659~~

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

AND

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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v.

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PETITIONERS' REPLY BRIEF

Respondents,* Federal Power Commission (Commission) and Virginia Electric and Power Company (VEPCO), in opposing the petitions for writs of certiorari, take issue with Petitioners both on the substantive questions presented and on the question whether petitioners have standing in court.

*Hereinafter "Respondents" will refer to the Commission and/or VEPCO.

I.

THE SUBSTANTIVE ISSUES IN THE CASE

Respondents assert that the court below correctly held (A) that Congress had not withdrawn the Roanoke Rapids site from the licensing authority of the Commission and (B) that the Commission was not barred, by Section 7 (b) of the Federal Power Act, from approving VEPCO's application.

A. MEANING AND EFFECT OF SECTION 10 OF THE FLOOD CONTROL ACT OF 1944

Respondents do not deny that the decision of the court below, interpreting Section 10 of the Flood Control Act of 1944, presents an important question of Federal law which has not been, but should be, settled by this Court.[1] They go into a labyrinth of statutory provisions, emphasizing some words, minimizing others, and setting up novel terminology[2] in order to eke out a conclusion that the court below reached a correct result. Such rationalization, however, can have no greater weight than the court's own reiterations that its interpretation was correct.[3] Stripped of irrelevancies and inaccura-

[1] VEPCO, in asserting that the question need not be settled, emphasizes its importance by injecting a constitutional issue (VEPCO, pp. 39–41).

[2] Of course, we cannot agree that a "comprehensive development of the Roanoke River Basin for flood control and other purposes" is not a "work of improvement" (See Comm'n, p. 17).

[3] No less than seven times the court stated that its interpretation of Section 10 was right and reasonable, and that Petitioners' view was unreasonable. For example:

cies in their legislative discussion (Comm'n pp. 20–21; VEPCO pp. 17–33) and in attributing contentions or theories to the Secretary which he had not advanced (e. g. Comm'n pp. 9, 14, 23–4; VEPCO pp. 22, 32–3), their arguments in no way rebut what we have presented in our petition for writ of certiorari. It would take considerable space to reply to all their statements, but this should be done in the argument on the merits, not on petition for certiorari.

This much is clear: Where a court adopts a test different from the one prescribed by statute (and, in order to justify such a step, it denominates a mere refusal by a Congressional committee to adopt a proposed change in existing law as "action taken by Congress"), where it undertakes to interpret a statute which is clear and unambiguous, where it interprets a statute so as to leave the key words of a provision without any effect, where it so interprets a statute as to give preference to a private privilege as against a public right, where the court's interpretation results in the surrender of huge potential assets of the United States to a private power company, where

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"* * * there can be no doubt that the proper interpretation of the act is as we have indicated" (V, 35).

"* * * we think that there can be no question but that our interpretation is correct" (V, 38–9).

"We think it clear that, while giving its approval to the comprehensive plan for the development of the Roanoke River Basin, Congress did not adopt it in its entirety for governmental construction * * *" (V, 33).

it interprets the statute without reference to its relation to the system of legislation of which it is a part, and where (in order to arrive at its result) it treats statements made before a Congressional committee as having greater weight than the express provisions of the statute itself, it cannot be said that the claim of error is without substance. In such cases, since the question of Federal law is important and has not been, but should be, settled by this Court, writs of certiorari should be granted (Rule 38 (5) (b)). The merits of the contentions should be debated after the writs are granted.

B. MEANING AND EFFECT OF SECTION 7 (B) OF THE FEDERAL POWER ACT.

Respondents do not deny that the court's interpretation of Section 7 (b) of the Federal Power Act presents an important question of Federal law which has not been, but should be, settled by this Court.

(i) They argue that, in concurring in the recommendation of the Board of Engineers for Rivers and Harbors, the Commission did not intend to approve the Federal development of all the eleven projects in the comprehensive plan (Comm'n p. 30). This draws into question the meaning of the Commission's concurrence in the conclusion of the Board of Engineers, and the meaning of the latter's recommendations. What did the Board mean when they recommended a compre-

hensive plan "at an estimated cost of $124,000,000" (I, 145)? Did they mean that only a part of this construction cost should be incurred by the United States, and that the remainder should be incurred by private interests? If so, what did they mean when they stated that "the estimated *Federal* construction cost, including transmission facilities, is $124,000,000" (I, 148)? What did they mean when they recommended that "to safeguard the interests of navigation and flood control the dams and power facilities should be constructed, operated and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers" (I, 149)? What did they mean when, after recommending improvements at eleven specified sites, they recommended that "the initial step" was to consist of Buggs Island and Philpott, with "the other units of the plan to be constructed progressively at such rates as future developments may indicate desirable" (I, 150)? These and other questions, we submit, should be debated after the writs are granted.

(ii) Respondents argue that the introductory phrase in Section 7 (b), "Whenever, in the judgment of the Commission", means "as long as" this is the Commission's judgment (Comm'n p. 31). This argument only emphasizes the need for an authoritative determination by this Court of the meaning of this important provision. We

cannot conceive of a statutory provision *prohibiting* the Commission from approving an application, "as long as" it is the Commission's judgment that the water resources should be developed by the United States, but leaving to the Commission the choice of avoiding such prohibition by saying that "by reason of changed circumstances" it had reached a "contrary judgment."

We do not contend that the Commission, having expressed a judgment that the development of water resources should be undertaken by the United States, is in all instances forever barred from changing its mind (VEPCO, p. 34). We do say that when the Commision arrived at such judgment with reference to the Federal development of the Roanoke River Basin and transmitted this judgment to the Chief of Engineers, when the latter based his findings and his recommendations to Congress on the Commission's recommendations, and when Congress, acting upon these findings and recommendations, approved the comprehensive plan for the Federal development of the Roanoke River Basin, then it was too late for the Commission to change its mind. The Court of Appeals held to the contrary, but only on the assumption that Congress had "taken no action in the meantime except with respect to the Buggs Island and Philpott projects" (V, 41). The least that can be said is that the court's decision is *probably* erroneous (See Pet. pp. 53–4). Here, again, since the decision

involves an important Federal question which has not been, but should be, settled by this Court, the writs applied for should be granted.

II

PETITIONERS' STANDING IN COURT

In view of Respondents' statements in opposition on the question of Petitioners' standing, we shall request this Honorable Court to dispose of this question at this time, thus clearing the way for a consideration of the important substantive questions presented. For this reason, we shall reply in detail to Respondents' arguments on this question of adjective law.

They argue that Petitioners herein are not parties "aggrieved" by the Commission's order and have no standing to obtain a judicial review thereof, because (A) the Secretary has no authority to appear for the United States in the capacity of *parens patriae,* and (B) the interests of the Secretary are not of an economic or financial nature, and the interests of both the Secretary and the REA Association are contingent and remote.[4]

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[4] VEPCO also argues (pp. 36–8) that the petition in No. 658 should be dismissed because Petitioner therein is not properly represented, relying on *Sutherland* v. *International Insurance Co.*, 43 F. (2d) 969. There the Alien Property custodian filed suit through a *private solicitor* who acted in that capacity and without authority from the District Attorney or the Attorney General. Here, both the Commission and the Secretary are represented by duly appointed attorneys who had qualified as such by taking their respective oaths

A. THE UNITED STATES IS THE REAL PARTY PETITIONER IN NO. 658

Respondents argue (Comm'n p. 13; VEPCO p. 34–5) that the Secretary has no authority to appear for the United States in the capacity of *parens patriae*. We feel that we ought to make our position clear, because (1) the United States was the real party in interest in the entire proceeding and (2) it is "aggrieved" by the Commission's order.

1. *The United States was the real party in interest in the Commission's proceeding*

When the Secretary filed his petition to intervene in the proceeding before the Commission, the Commission's staff Counsel and VEPCO vigorously opposed his intervention on the ground that he represented not his own interest, but that of the United States. This the Secretary admitted. Now, apparently, Respondents argue that the Secretary must point to "express language" authorizing him to appear for the United States. We submit that the authorities cited in our petition (p. 23) clearly demonstrate that the United States was a party, both before the Commission and in the court below, through the person of the Secretary of the Interior.

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of office, and they are appearing herein under the authorization of the Solicitor General. This practice was followed in *I. C. C. et al.* v. *Inland Waterways Corporation*, 319 U. S. 671, 683; in *I. C. C.* v. *Jersey City*, 322 U. S. 503; and in *North Carolina* v. *United States*, 325 U. S. 507.

In addition, this argument was made in, and was *sub silentio* overruled by, the Court of Appeals (V, 30). No cross-petition was filed to review this ruling.

2. The United States is an aggrieved party

We do not deny that the Commission, in so far as it acts within the limits of its statutory authority, represents the interests, and stands in the position, of the United States. This does not mean, however, that in matters pertinent to the development of the Nation's water resources the Commission is the sole guardian of the interests of the United States. In the case of bodies of water which constitute international boundaries, the Secretary of State also represents the interests of the United States. Under the flood control acts and under the river and harbor acts, the Secretary of the Army represents the interests of the United States. Under the Reclamation laws and the flood control acts, the Secretary of the Interior represents the interests of the United States. To avoid dispute on this subject we understated considerably the Secretary's position, when we stated that "in the disposition of power from Army projects, the Secretary is the agent of the United States" (Pet. p. 23).

Since the Secretary does represent interests of the United States, it was quite proper for him to appear before the Commission to protect those interests. The court below recognized that the United States did have an interest in the proceeding, but stated that "the safeguarding of that interest has been confided to the Power Commis-

[5] For analogy, see *Ex Parte: Young*, 209 U. S. 123.

sion" (V, 31). We pointed out that in this respect the court begged the question, since the proper application of Section 7 (b) of the Federal Power Act is one of the substantive issues in the case (Pet. p. 24). However, there is an additional fallacy in the court's reasoning. It assumes that the interests of the United States, as represented by two agencies of government, are mutually exclusive. This is not so. There are many instances of overlapping interests. Whether one or another agency gives proper effect to these interests may have to be resolved, and in a "case or controversy" the proper method is by judicial review, as provided by law.

We, therefore, cannot understand Respondents' argument that the Secretary is seeking to exercise "supervisory control over the Commission" (Comm'n p. 13). This contention can be explained only in terms of its evolution. In their opposition to the Secretary's petition to intervene in the proceeding before the Commission, they had argued that, by granting leave to intervene, the Commission would abdicate its powers and functions to the Secretary. When it was pointed out that there is no more substance in this contention than to say that a court abdicates its judicial powers when it grants a petition to intervene, the argument was changed, in the court

[6] Curiously, the Commission (p. 14) failed to understand this point, despite our reference to *Associated Industries v. Ickes*, 134 F. (2d) 694, 699.

below, to a complaint that the Secretary was seeking to become a "partner" in the Commission's determinations. But neither by intervening in the proceeding before the Commission, nor by petitioning for a review of its order, did the Secretary seek to act as the Commission's "partner".[7] Now they say that the Secretary is seeking to exercise "supervisory control over the Commission". We submit that this contention has no more substance than to say that *any person* seeking review of an order of the Commission assumes to "exercise supervision", or that by filing a petition for writ of certiorari in this Court he seeks "to control" the determinations of the Court of Appeals or of this Court.

Having shown that the United States was a party in the proceeding before the Commission, there is but one way of demonstrating that it is an "aggrieved" party entitled to obtain judicial review, and that is by enumerating its interests which are adversely affected by the Commission's order. These, among others, are:

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[7] To the contrary, when the Comission invited the Secretary to report on VEPCO's application (R. 5099) and when, in its order of May 6, 1949 (V, 22), it ruled that formal intervention by the Secretary was not necessary, "since his assistance as a coordinate Federal agency is always welcomed in order to secure full presentation of the issues involved", that might have been construed as an offer of partnership. The Secretary, however, did not accept this offer, but chose to intervene like any other interested party, subject to all the limitations imposed on interveners and without expectation of any special privileges.

(a) Assumption of jurisdiction by the Commission to issue a license for a project site reserved by Congress for Federal development adversely affects the interests of the United States.

(b) The Commission had already expressed its judgment that the development of the water resources of the Roanoke River Basin should be undertaken by the United States itself. The issuance of a license for Roanoke Rapids, which is the most valuable of the project units in this river basin development, adversely affects the development of the river basin by the United States.

(c) The United States has an interest in the orderly process of Government. When a Commission reverses its recommendation upon which Congress had relied in enacting legislation, the interests of the United States are adversely affected.

(d) The United States has a proprietary interest in the power potentials of its own hydroelectric projects. The order issuing a license in this case results in the surrender of huge potential power assets of the United States. In this respect, also, the interests of the United States are adversely affected by the order.

(e) The United States has an interest in the welfare of the consumers of electric power and in the proper execution of its laws, including Section 5 of the Flood Control Act of 1944. Any interference with, or burden imposed on, the Secretary of the Interior in the performance of his responsibilities under this law adversely affects the interests of the United States.

In these circumstances it cannot be maintained that the United States is not the real party in interest, or that it is not "aggrieved" by the Commission's order.

Since the Secretary's interests are those of the United States, he may appear in the controversy as *parents patriae,* without a showing that the order in question adversely affects his interests, except his general statutory interest in hydroelectric developments and their utilization for the public welfare.[8]

By numerous statutes passed since 1849, when the Department of the Interior was created, the Secretary has been charged with duties and responsibilities relating to land and water resources. These involve, or are affected by, the development of power, especially hydroelectric power. His interest in hydroelectric projects is not limited to those undertaken by the Federal Government, but extends to all such projects, public and private. The Commission has recognized this interest, and whenever an application is filed for a preliminary permit or for a license to construct a project, the Commission informs the Secretary and requests his comments thereon.[9] In a spirit

[8] *In re Debs*, 158 U. S. 564, 584; *United States v. Minnesota*, 270 U. S. 181, 194.

[9] In some instances, similar notices and requests for comments are sent to the Corps of Engineers, the Forest Service of the Department of Agriculture, and the U. S. Public Health Service.

of cooperation, dictated by the principle that the Government should act as a consistent whole, the Secretary makes his recommendations.[10] In these circumstances, we submit, the Secretary's standing in court is established.

B. THE SECRETARY AND THE REA ASSOCIATION ARE "AGGRIEVED" PARTIES AND HAVE STANDING IN COURT

We shall now proceed on the assumption that the Secretary's interests are separate and distinct from those of the United States and shall demonstrate that his interests are substantial enough to constitute him a party "aggrieved" by the Commission's order granting a license for Roanoke Rapids.

Before doing so, however, we think it is important

[10] Since 1948, he has had occasion to comment on approximately 150 applications. In about 50 of them, he recommended various conditions for the preservation of fish and wildlife; in some 5 instances he recommended conditions relating to the transmission of power; in about 15 cases he made recommendations pertaining to land rights, water rights, the timing of construction, compensation to be paid to Indians, etc.; in about 15 cases he recommended dismissal or denial of applications—in 6 of these, on the ground that the proposed power developments would be in conflict with projects undertaken or to be undertaken by the United States; in all other cases he interposed no objections or recommended issuance of licenses. (Compare: Comm'n, p. 26.)

In view of the fact that the Commission recognized the Secretary's interest by inviting his report on VEPCO's application (R. 5099) and by granting his petition for leave to intervene (I, 71), a question arises, indeed, as to the propriety of Respondents' argument that the Secretary does not have a substantial interest which is adversely affected by the Commission's order. *Chicago Junction case*, 264 U. S. 258, 268.

to dispose of Respondents' argument setting up a distinction between a private party selling power at a profit, and the Secretary of the Interior, who, under Section 5 of the Flood Control Act of 1944, must dispose of power at cost (Comm'n. pp. 9–11, 23).

According to their argument, had Petitioner been a private party who engaged in the business of selling power for his own profit, he would have been "aggrieved" by the Commission's order and would have had standing in court. Here they overlook the fundamental reason why such a private party may obtain judicial review of the Commission's order. Because of the fact that such a party is adversely affected, economically or financially, the statute gives him a right to vindicate the public interest,[11] for the Commission may issue licenses only if it is in the public interest to do so. As this Court said in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 14:

> *The Communications Act of 1934 did not create new private rights.* The purpose of the Act was to protect the public interest in communications. By Section 402 (b) (2), Congress gave the right to appeal to persons "aggrieved or whose interests are adversely affected by the Commission's action." * * * *But these private litigants have standing only as representatives of the public interest.* [Emphasis supplied.]

[11] This also answers the Commission's reference to "public defender" statutes (Comm'n, p. 13).

The same proposition applies to the Federal Power Act. If a private party aggrieved by an order of the Commission may appear to vindicate the public interest, it would follow, as a matter of course, that a public officer, like the Secretary of the Interior, charged with statutory responsibilities, may appear to vindicate the public interest.

While the Secretary's interest extends to all hydroelectric developments, we are proceeding herein on a much more limited basis, namely, the interest of the Secretary in Federal projects, and particularly in the disposition of power therefrom. In this limited view, and stripped of the dignity and responsibilities of his high office, the Secretary appears as a competitor in the sale of power in the Buggs Island-Roanoke Rapids area (Pet. pp. 12–22). The failure of the Court of Appeals to give recognition to this interest, which gives him standing to seek judicial review, was in conflict with the decisions of this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, and *Scripps-Howard Radio, Inc.* v *Federal Communications Commission*, 316 U. S. 4 (Pet. p. 22).

This is the minimum implication of these decisions. The principle pervading them is that a party is "aggrieved", if he has a substantial interest which is adversely affected by an administrative order. The interest may be sovereign in character, or it may be one based on a statutory right or obligation, or it may be a proprietory

interest, or it may be an economic or financial interest, like that of a competitor in the same or in a related line of business, or like that of a supplier of materials, or like that of a labor organization, or like that of a group of consumers. These are examples of substantial interests which may be affected by administrative orders.

Respondents, however, remember the examples and forget the principle. They argue that the Secretary's interest is not that of a competitor with the same economic or financial interests as in the cases cited above (Comm'n pp. 9–12).

Apart from the propositions that the Secretary's interest is economic and financial in character, and that such interests do not exhaust the category of interests, the invasion of which determines whether a party is "aggrieved", their argument that the Secretary does not have a competitor interest is without merit. They base their contention (Comm'n p. 8) on the following statement in the Senate Report on H. R. 4485, which became the Flood Control Act of 1944 (Report No. 1030, 78th Congress, 2d Session, p. 3):

> The Committee desires an amendment which provides a convenient and practical method of disposing of water at projects under the control of the War Department *without setting up a public power trust which would be unduly competitive with established private power companies.* [Emphasis supplied.]

In delegating the function to dispose of power from Army projects to the Secretary of the Interior, Congress did not establish a "public power trust". From the discussion which will follow, it will appear evident that the Secretary's disposition of power is not "unduly competitive". When the Committee used the words "unduly competitive", it must have recognized that the disposition of power generated at Army projects would be competitive with private power in the respective areas. There would have been only one way of disposing of the power without its being competitive with private power companies; namely, by selling all the power to them at the bus bar. Congress could not have intended such result, for then the preference provisions in Section 5 would have been without meaning.

Of course, the Secretary's interest transcends that of any private person. This becomes evident when one considers (1) the magnitude of his task; (2) the Federal power policy, its objectives and its application; (3) his concern with future customer loads; (4) his concern with the construction of Federal hydroelectric projects; (5) the fact that his interest is direct and immediate; and (6) the magnitude of the adverse effect of the Commission's order.

(1) *The magnitude of the Secretary's task*

Respondent's argument reflects the Commission's view that the Secretary's interest must be

measured by what he can do at this time in connection with projects in the Roanoke River Basin.[12]

The Secretary's task is by far more extensive. It is not limited to individual projects. It is a function in which all parts are interconnected, and embraces all government reservoir projects, except those which are under the jurisdiction of the Tennessee Valley Authority. He markets power generated at government projects through four main agencies: the Bureau of Reclamation, the Bonneville Power Administration, the Southwestern Power Administration, and the Southeastern Power Administration.[13] While the Bureau of Reclamation markets power mainly from Reclamation projects, it also markets very substantial quantities of power from Army projects. The Bonneville Power Administration was set up under the Bonneville Project Act, 50 Stat. 731, to dispose of the power generated at the Bonneville Dam. Under a delegation of authority from the Secretary, however, it also

[12] The Commission found that the only function "assigned by Congress to the Secretary of the Interior in connection with the development of the Roanoke River is to dispose of surplus power generated in the Buggs Island and Philpott flood control projects" (I, 46).

[13] There are also projects operated, and power therefrom is marketed, by the Bureau of Indian Affairs, the National Park Service, and the Bureau of Mines, which are agencies of the Department of the Interior. Their electric power operations, however, are on a much smaller scale.

markets power from Reclamation and Army projects in the Columbia River Basin. The Southwestern and Southeastern Power Administrations are the Secretary's agencies for the marketing of power from Army projects in their respective areas. During the fiscal year 1951 the Secretary, through these agencies, disposed of about 25 billion kwh of electric energy at a gross revenue of over $67,500,000.[14]

All this, however, is by no means an adequate estimate of the Secretary's interest in the disposition of power, for there are now additional projects under construction; there are projects for which appropriations have been authorized, but construction of which has not yet begun, and there are projects which are included in plans which Congress has "adopted" or "approved" for construction, but for which it has not yet authorized any appropriations.[15]

[14] Annual Report of Secretary of the Interior (1951), p. 125.

[15] The magnitude of the Secretary's marketing responsibility may be gathered from Exhibit 25 (R. 3776), introduced by the Commission's staff. In the Flood Control Acts since 1936, Congress "adopted and authorized" a large number of projects in which are included 145 plants with power facilities. Of these, 8 plants are in operation, with a total capacity of 970,400 kw and an annual energy output of 4,930,000,000 kw hours. There are 23 plants under construction, with a total capacity of 3,680,175 kw and an estimated annual energy output of 18,546,000,000 kw hours. Funds have been authorized for the construction of 40 additional plants, with a total capacity of 7,983,600 kw and an estimated annual energy output of 44,201,000,000 kwh. There are also 74

(2) *The Federal power policy, its objectives and application*

Respondents' argument as to the economic interest of the Secretary, reflects their testimony that he would not be adversely affected by the issuance of a license for Roanoke Rapids, since VEPCO was ready and willing to purchase the entire output of Buggs Island, and since the four electric utilities in the area would be able to absorb the entire output of all the units in the comprehensive plan as rapidly as they could be constructed (I, 291–6), as if his entire function were to turn power into cash (Comm'n pp. 11–12; VEPCO p. 4).

Even if the Secretary's functions in the disposition of power were the same as those of a head of an ordinary electric utility, it would have been incorrect so to characterize his interest. While the head of an electric utility does have a responsibility to the investors to obtain a net return on their capital, he also has a responsibility to the public to render and maintain adequate service. The Secretary, also, has a financial responsibility to recoup the costs involved in the investment, operation and maintenance of the

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plants within projects "adopted and authorized," but for which appropriations have not yet been authorized; these are estimated to have a capacity of 5,479,150 kw and a total annual energy output of 24,264,000,000 kwh. Including the capacity and energy of Reclamation projects, the total power marketing responsibility of the Secretary, as of the present time, may be measured by a grand total of over 24,000,000 kw of capacity and about 120,000,000,000 kwh of energy per year.

Federal projects. This responsibility is great enough, but it is dwarfed by his far greater responsibility to distribute the benefits of low cost power in accordance with the Federal Power Policy.

(a) The Federal Power Policy

Briefly, the Federal Power Policy, as reflected in acts of Congress, has two aspects; one relating to the utilization of power, the other to the rates. The first is a policy against monopolization of power and in favor of its most widespread use; the second is a policy that such service should be rendered at cost, and that consumers should pay the lowest possible rates consistent with sound business principles.

This is not a new policy, nor any radical departure from established principles, but one patterned after the functions and duties generally attributable to public utilities. The policy to encourage the most widespread use of power is analogous to the duty of a public utility to serve the public generally and to make its service available to all that need it. The policy to dispose of power in such a manner that the consumers will pay the lowest possible rates consistent with sound business principles is analogous to the duty of a public utility to render service at "cost" (including the cost of capital).[16]

[16] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603; also *Mo. ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission*, 262 U. S. 276, 291.

For a better appreciation of the Federal Power policy it is well to note a few of the legislative landmarks in the development of its two aspects, and its extension to flood control projects.

(i) Encouragement of most widespread use

In the Act of April 16, 1906, 34 Stat. 117, Congress, recognizing that the waters conserved for irrigation could also be utilized for the production of power, authorized the Secretary of the Interior to lease any surplus power or power privilege, giving preference to *municipal purposes,* thus evidencing an intention that the power benefits should be made widespread, rather than be concentrated in one or a few persons or corporations.

In the Raker Act of 1913, 38 Stat. 242, the City of San Francisco was granted the use of National Park lands for the purposes of storing water for domestic use and for developing power. In this Act, the City was prohibited "from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy". Here, again, Congress expressed the policy that this power should not be monopolized or limited in use, but that it should be widespread.

In 1933 Congress passed the Tennessee Valley Authority Act, 48 Stat. 58, in which it provided for the full utilization of the water resources of the region, including the production of power. It

provided that, in the disposition of power, the benefits of this governmental undertaking should inure directly to the people of the region. These benefits were to be as widespread as possible, by giving preference to States, counties, municipalities and cooperative organizations "not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members". In this Act, and in its later amendments, this policy against monopolization of power developed by the Federal Government is emphasized by provisions for the encouragement of the use of electric energy for domestic and rural consumption and by provisions imposing controls in the sale of power for resale.

In 1936 the Rural Electrification Act, 49 Stat. 1363, was passed to enable farmers organizing nonprofit organizations to construct or acquire facilities for the transmission and distribution of electric power to their members. This act, together with the acts which made low cost power available, has had the effect of furthering the policy against monopolization, and for the widespread use of electric power.

In 1937 Congress passed the Bonneville Project Act, 50 Stat. 731, in which the policy against monopolization of power was reiterated and in which it was provided that preference in the sale of power be given to "public bodies and cooperatives". In this Act, some of the means for

effecting widespread use were specified, by authorization to construct transmission facilities for carrying the power to existing and potential markets, by provisions for uniform rates, and by provisions for interconnection with other systems. The same policy was implemented in the Fort Peck Act of 1938, 52 Stat. 405, in which, after declaring that the "facilities for the generation of electric energy at the Fort Peck project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers", the Bureau of Reclamation was required, in disposing of the power, to give preference to public bodies and cooperatives.

(ii) Service at Lowest Possible Rates

At the same time, Congress consistently recognized the necessity of making power available to consumers at the lowest possible rates, or at cost. The preference in the sale of power given to States and municipalities in the Reclamation Acts meant that the consumers would receive such power at cost, and that the people would receive the full and undiminished benefit of the power. In the Tennessee Valley Authority Act, *supra,* Congress expressly provided that the T. V. A., in selling power to (or for the use of) industry, should secure a sufficiently high load factor and revenue return to "permit domestic and rural use at the lowest possible rates". In this Act (Secs. 9 (a) and 10), Congress also sowed the seed which

germinated in the rate provisions of the later enactments.

Beginning with the Bonneville Project Act of 1937, Congress provided that the rate schedules applicable to power generated at Government projects should be draw with due regard to the recovery of the cost of producing and transmitting the electric power, including the amortization of the capital investment over a reasonable number of years; and by the capital investment, as applied to multiple-purpose projects, Congress meant the investment fairly allocable to power. Substantially, the same provision was included in the Fort Peck Act of 1938, and in the Reclamation Project Act of 1939, 53 Stat. 1187.

(iii) Extension of the Federal Power Policy to Flood Control Projects

While these policies were being developed with respect to the disposition of power from Federal projects, developments were taking place with respect to flood control. In 1917 Congress passed an Act, 39 Stat. 950, authorizing the Army Engineers to conduct examinations and surveys for flood control and allied purposes on a watershed basis. Congress required that the reports of the Board of Engineers for Rivers and Harbors should include, *inter alia*, data in regard to *"the possible economical development and utilization of water power"* (emphasis supplied). From time to time, thereafter, Congress authorized and di-

rected that surveys be made of river basins and, upon reports submitted by the Army Engineers, authorized the construction of flood control projects, some with and others without power facilities.

Prior to 1936, the Flood Control Acts concerned themselves with specific improvements to control the destructive flood waters as a means of preserving the navigability of streams, without reserving the power developments for the United States itself. In the Flood Control Act of 1936, 49 Stat. 1570, Congress, in a Declaration of Policy, recognized the responsibility of the Federal Government to construct Federal flood control projects as multiple-purpose projects including the development of power. In that Act, it adopted and authorized a large number of projects "for the benefit of navigation and the control of destructive flood waters and other purposes", and provided that "penstocks or other similar facilities, adapted to possible future use in the development of adequate electric power *may* be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers".

In the Flood Control Act of 1938, 52 Stat. 1215, Congress again authorized the construction of a large number of projects for flood control, and there it provided that penstocks and other facilities adapted to future use in the development of electric power *shall* be installed in any dam there-

in authorized, when approved by the Secretary of War upon recommendation of the Chief of Engineers and the Federal Power Commission. The same provision was included in the Flood Control Act of 1941, 55 Stat. 638, and in the subsequent flood control acts.

By the end of 1944, Congress had adopted and authorized many projects or river basin developments for flood control and the production of power as Federal undertakings. It was necessary to set up administrative machinery for the disposition of the power to be generated at these projects. This was done in Section 5 of the Flood Control Act of 1944, which vested in the Secretary of the Interior the function of transmitting and disposing of the power and energy generated at all reservoir projects under the control of the Department of the Army. At the same time, Congress reasserted and implemented the policies previously developed, by requiring the Secretary to market this power in accordance with the following standards:

(*a*) the power must be disposed of in such a manner as to encourage the most widespread use thereof;

(*b*) preference in the disposition of such power must be given to public bodies and cooperatives;

(*c*) the power must be disposed of in such a manner that the consumers will benefit therefrom at the lowest possible rates consistent with sound business principles; and

(*d*) the rates at which the power is sold must be so calculated that, on the basis of their application to the power capacity, they will, over a reasonable number of years, recover the cost of producing and transmitting the power, including amortization of the investment fairly allocable to power.

These standards are interrelated. "Most widespread use" means most effective use by the greatest number; it does not mean such wide use that the potential benefits of the power are dissipated. Encouragement of most widespread use of power can best be effected by giving preference in the sale of power to public bodies and cooperatives. This method of disposition of power also means disposition of power in such a manner that the consumers will benefit therefrom at the lowest possible rates and itself results in greater consumption and in more widespread effective use of power. Of course, the lowest possible rates must be consistent with sound business principles, which means that the cost of power, including the investment in power with interest thereon, should be borne by the consumers. To the Secretary was delegated the discretionary function so to balance these standards that the disposition of the power would also carry the maximum benefits to the people.

(b) Objectives of the Federal Power Policy

The Federal Power Policy is of value only in so far as it can be made to operate for the good of the

people in the construction of multiple-purpose projects and in the disposition of power therefrom.

(i) The objective in the construction of multiple-purpose projects is to make full comprehensive use of the land and water resources in their relation to each other. In all these developments, and not merely in the case of flood control projects,[17] Congress has pursued the policy of authorizing such project works as are economically feasible, that is, where the benefits are equal to or exceed the costs. However, Congress has made a distinction between "reimbursable" and "nonreimbursable" uses or purposes. To the former belong such purposes as power development, irrigation, and municipal water supply. They are in the nature of services rendered to specific persons or groups of persons, and all the costs involved in these services are borne by them. To the latter class of purposes belong navigation, flood control, salinity control, and others, which are intended to benefit the people generally. The costs involved in these purposes are borne by the Federal taxpayers.

The charges for particular services of the reimbursable class must recover the costs allocated thereto. Except where otherwise provided by law,[18] the users of power, for example, are not required to subsidize any other purposes or uses

[17] As set forth in the declaration of policy in Section 1 of the Flood Control Act of 1936 (see Pet., p. 62).

[18] As in the case of the "irrigation subsidy", where part of the irrigation costs are borne by the power developments.

of the multiple-purpose projects. Nevertheless, even within the framework of this principle, power development often serves to make flood control and irrigation projects economically feasible. Without power development sharing in the joint costs of the multiple-purpose projects, many of the needed flood control and irrigation developments would be economically infeasible.[19] Of course, at the same time, the economic feasibility of a power development is enhanced, if it is a part of a multiple-purpose project. Power development thus plays an important role in the construction of multiple-purpose projects, the objective of which is to achieve the maximum benefits for the people in their respective areas.

(ii) The objective in the disposition of power is to benefit the consumers and, incidentally, the power industry itself.

The sale of power in such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers is justification enough for the Federal Power Policy, especially when power is sold to rural cooperatives. The farmer has long lagged behind his urban brother in the standard of living. With low cost power, however, he can now enjoy some of the advantages of our industrial development, to which he

[19] At times project units themselves would be infeasible except as parts of a comprehensive river basin plan. An example is presented by the comprehensive plan for the development of the Roanoke River Basin (see Pet., p. 43).

has long been entitled. With low cost power come, also, many appliances as aids in farming, in household work, and in the enjoyment of leisure. The advantages of our highly developed urban life are brought to his door through refrigeration, radio, television, etc. It is sufficient to point out that in 1935 only about 11% of the farms were electrified. Now, with the operation of the Rural Electrification Administration and the sale of public power to rural cooperatives, over 84% of the farms are electrified.[20]

The advantages of this low cost power do not stop with the consumers of Government power. A still greater effect is to be found in the fact that this low cost power appears as a competitive element in the adjacent areas served by the private power companies, reducing the rates charged by them.[21] The impact of this competition is especially felt in the rates charged by them to rural consumers. If one compares the wholesale rates charged to rural consumers by private power companies in the Southeast with those in the Northeast, and the rates charged by them in the Southwest with those in the West North Central states, one will find that in the states with little or no public power the charges are approximately 80% higher than those charged in the states where public power appears as a

[20] Agricultural Statistics (U. S. D. A.) 1951, p. 647.

[21] The Commission thinks that this is irrelevant (Comm., p. 24).

competitive element.[22] If one compares the wholesale rates for 1941 through 1950 charged by private power companies in the States of Texas and Oklahoma (where public power is available) with those in the Northeast and Middle Atlantic states, one will find that the latter exceed the former by 187%.[23] Herein lies a major part of the economic importance of low cost Government power to the rural population.

This economic effect extends to the urban population. For them the rates are also reduced, and the decrease in rates means greater consumption of power, greater use of electrical appliances, greater use of electrical advertising, and expanded sales of commodities.

Most of the power companies do not find it necessary to make their service available at low rates, because they do not operate in a competitive field. They have had to be forced to lower rates through the police functions of the regulatory commissions and through the competitive element of public power. Whenever rates were lowered, however, the consumption of electric power increased, and the effect was to improve, rather than harm, their financial condition. This is illustrated by what has transpired during the past decade and a half around the TVA area. For the years 1937 through 1949, the average

[22] Report of the President's Water Resources Policy Commission, Vol. I, p. 229.

[23] Ibid., p. 231.

rate of return of the private power companies throughout the United States was 7.11%; while in the areas adjoining the TVA the rate of return of the private power companies for the same years was 8.27%.[24]

(c) Application of the Federal Power policy.

The application of the Federal Power Policy is marked by a continuous economic struggle with the monopolistic tendencies of the private power industry.

In practically all instances, whenever the economic feasibility of developments for flood control or other public uses have included power, private power companies have opposed such developments. Where they have failed in this effort, they assumed the position of supporting the hydroelectric developments, but only with the expectation that the power would be turned over to them.[25] Some companies have sought to strike at the expansion of Federal power development by applying for licenses to construct projects which would interfere with, or prevent, the carrying out of plans for the construction of Federal hydroelectric projects. A notable example is the application of the Pacific Gas & Electric Company

[24] Ibid., p. 235.

[25] In our petition (pp. 19–20), we have referred to VEPCO's efforts against the construction of Buggs Island and to its later support of this development with the expectation that all, or at least one-half, of the power generated at this project would be turned over to this company.

for licenses to construct projects on the North Fork Kings River in California, which would interfere with the Central Valley Project of the Bureau of Reclamation.[26]

The most extreme example was the application of the Savannah River Electric Company (a subsidiary of the Georgia Power Company) for a license to construct the Clark Hill project, one of the units in the comprehensive plan for the development of the Savannah River, approved in Section 10 of the Flood Control Act of 1944. That attempt was unsuccessful. The Commission *dismissed* the application and the Circuit Court of Appeals for the Fourth Circuit affirmed the order.[27] The Company was not satisfied. It had

[26] The Commission, over the objection of the Secretary of the Interior, granted the licenses, and the case is now pending on petition for review before the United States Court of Appeals for the Ninth Circuit.

[27] *Savannah River Electric Company* v. *Federal Power Commission*, 164 F. (2d) 408. If the Commission is right that flood control acts do not have the effect of withdrawing the project cites "adopted" or "approved" for Federal development from its licensing jurisdiction (Comm'n, p. 15), then the Commission erred in dismissing, rather than denying, the application for Clark Hill (6 F. P. C. 317), and the Fourth Circuit erred in doubting that the Commission had jurisdiction to entertain the application or even to make recommendations to Congress with respect to public or private development of this project site (*supra*, p. 411). Indeed, it would also follow that the Commission would have jurisdiction, under Section 4 (e) of the Federal Power Act, to license the Buggs Island project and any other project constructed by the Federal Government—and then Section 5 of the Flood Control Act of 1944 would be completely without effect.

a bill introduced in Congress (H. R. 3826, 80th Congress, 2d Session) to direct and authorize the Commission to issue a license for the construction of the power house at Clark Hill. Hearings were held before the House Committee on Flood Control, but the bill was never reported out. Had this bill been enacted, net power benefits in the sum of $112,000,000 over the 50-year period of the license would have been surrendered to the company.

Since the Clark Hill case was decided on the narrow ground that Congress had already appropriated funds and Federal construction had been commenced on this project, VEPCO filed this application for Roanoke Rapids, for which appropriations have not yet been authorized. This application, like the one for the Clark Hill project, however, strikes at the heart of public power development. As we have indicated in our petition (pp. 56–8), the licensing of this project would not only result in diminishing the amount of power available for distribution among the people in the area in accordance with the standards discussed above, not only in lessening the value of, and increasing the rates for, Buggs Island power, not only in surrendering to VEPCO the potential benefits of the Government's investment in Buggs

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Incidentally, the phrase "*pro tanto* repeal," used in this connection, is Respondents' (Comm'n., p. 15), not the Secretary's. Withdrawal of project sites for Federal development is in accord, not in conflict, with the Federal Power Act.

Island, but also in disrupting the entire River Basin plan approved by Congress. The maximum benefits of the plan can be realized only if Buggs Island, Gaston and Roanoke Rapids, together with the other units in the Roanoke River Basin plan, are operated under common ownership and control.

So much for the application of the Federal Power Policy in the construction of projects. We shall now turn to the application of this Policy in the disposition of power.

As has already been stated, the task of distributing the power in accordance with standards in Section 5 devolves upon the Secretary of the Interior. His responsibilities and methods in the performance of this task may briefly be described as follows:

(1) His economic and financial responsibilities are twofold: On the one hand, he must make certain that the full and undiminished benefit of the power should inure to the consumers in the area on as widespread a basis as possible. On the other hand, he must make certain that the full cost of the power, including the cost of the investment allocated to power, will be recovered from the consumers, so that no part of the cost will constitute a burden on others. In this manner the power developments will cost nothing either to the United States or to the taxpayers.

(ii) Wherever possible, his objective is to sell the power generated at Government projects to pub-

lic bodies and cooperatives. At the same time, it is also important that power should not be wasted. Therefore, in conformance with the Federal Power Policy, the Secretary has adopted the practice, if such preference customers are not available, or if their power requirements are not sufficient to absorb all of the power, of selling the power to privately-owned utilities, reserving, however, so much of the power as may be utilized by preference customers in the future.[28]

(iii) In order to dispose of power, it is necessary that transmission and related facilities should be available. The law provides, and sound business judgment requires, that only such facilities should be constructed or acquired as are necessary to make the power available in wholesale quantities. Sound business judgment also requires that transmission facilities should not be unnecessarily duplicated. The Secretary has therefore pursued the policy of utilizing privately-owned transmission facilities with adequate capacity for the purpose of transmitting Government power, provided that contracts for this purpose can be entered into consistent with the Federal Power Policy.

These, in general, are the Secretary's main problems in the application of the Federal Power Policy. However, the performance of his task is complicated by many obstacles:

[28] For testimony on this application of the Federal Power Policy, see I, 309–11.

(i) When construction of Federal hydroelectric projects is first commenced, privately-owned electric utilities often seek to construct transmission lines from their systems to the dams.[29] This is done, not for the purpose of wheeling power for the Government, but for the purpose of blocking the sale of such power in accordance with the Federal Power Policy of giving preference to public bodies and cooperatives. The purpose of the electric utilities is to force the Secretary to sell the power to them at the bus bar, and thus to monopolize the power produced at the Government's dams.

(ii) The Secretary's responsibilities require him to resist such tactics.[30] He, therefore, issued instructions to the various power marketing agencies in the Department, embodying a set of

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[29] VEPCO constructed three transmission lines to the Buggs Island project. House Hearings on Interior Department Appropriations for 1953, p. 1568.

[30] When it became evident that private power companies would seek to construct high voltage transmission lines over public lands under the jurisdiction of the Department of the Interior for the purpose stated above, the Secretary promulgated general regulations requiring such companies to stipulate that they would wheel Government power over such lines to the extent of their unused capacity, upon the payment of compensation as provided in the regulations. The validity of such regulation is involved in No. 483, *Federal Power Commission* v. *Idaho Power Company*, now pending on writ of certiorari. The validity of the regulation has also been attacked in the case of *Idaho Power Company* v. *Chapman*, Civil No. 4540–50, in the United States District Court for the District of Columbia.

principles to be used as a basis for entering into wheeling arrangements with private power companies.[31] These principles are:

(1) that the policies embodied in the law must be followed;

(2) that transmission facilities which interconnect the Government's sources of supply with each other and with load centers should be owned and controlled by the Government;

(3) that the power programs of the Department should be developed consistently with the above and with a view toward utilizing existing non-Federally-owned transmission capacity under arrangements satisfactory to the Government; and

(4) that the arrangements should provide for (a) assurance to the Government's customers of the same high quality of service, the same opportunity to develop and serve increased loads, and the same right to contract directly with the Government as they would have if the Government were to build its own facilities, (b) safeguarding fully the rights of preference customers, (c) avoidance of monopolization of power which would result from the sale thereof at the bus bar or otherwise; (d) equally or more advantageous methods of supplying power to the Government's customers, as compared with the condition that would obtain if the Government constructed sepa-

[31] Senate Committee Hearings on H. R. 3790, 82d Congress, 1st Sess., p. 35.

rate transmission facilities, (e) reasonable compensation to be paid for the use of transmission capacity of others, but in no event greater than the cost to the Government of its own transmission capacity;[32] (f) whenever practicable, exchange of power upon reasonable terms, for the firming up of the power supply of both the Government and of the utility, for economical operation, and for emergency breakdown relief, and (g) cancellation of arrangements on reasonable terms.

(iii) The power companies have countered by refusal to wheel Government power altogether, or by refusal to wheel power to particular classes of customers. Some of the power companies have offered to wheel power at such excessive rates that the benefits of the Government's project would accrue almost entirely to them.[33]

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[32] This principle is based on two considerations: The first is inherent in the duty of a public utility to render service at rates which are reasonable. The second is embodied in the requirement of Section 5 that the power must be disposed of at rates which would recover the costs of generation and transmission, and in such a manner that the consumers would pay the lowest possible rates consistent with sound business principles. If the wheeling charge is greater than would be the cost of such transmission over the Government's own facilities, and such cost is passed on to the consumers, the rates to them would not be the lowest possible consistent with sound business principles.

[33] See VEPCO's offer to wheel power from Buggs Island. Hearings on Second Supplemental Appropriation Bill for 1951 before the Interior Department's Subcommittee on Appropriations, House of Representatives, 81st Congress, 2d Session, pp. 106–8.

(iv) In order to carry out his responsibilities, the Secretary is required to request Congress for appropriations for the construction of such transmission lines as would be necessary to transmit power from the dams to the load centers. Thereupon the power companies appear before the Congressional committees and vigorously oppose such appropriations on the theory that they already have transmission lines in the area and that they are willing to wheel power for the Government.[34] Even after such appropriations are granted, the power companies appear before the Congressional committees urging revocation of the appropriations.[35] (See VEPCO, pp. 35–6.)

(v) Having thus exerted their political influence, the private power companies now exert their economic power. They insist on various devices whereby the power would actually be sold to them, so that they might sell it to preference customers, or to limited groups of preference customers, at prices which would be attractive to the latter and which would be lower than the usual rates charged by these companies to other consumers of the same class. One power company

[34] Hearings on Second Supplemental Appropriation for the fiscal year 1951, 81st Cong., 2d Sess. House Hearings, pp. 87–89; Senate Hearings, p. 345. For a combined effort of power companies in this respect, see House Hearings on Interior Department Appropriations for 1953, pp. 1533–1572.

[35] Hearings on Interior Appropriations for the fiscal year 1952, House Hearings, p. 1455; Senate Hearings on H. R. 3790, 82d Cong., 1st Sess., pp. 980–992.

went to the extent of demanding that it should be constituted, not only as an agency to transmit power, but also for the performance of all, or most all, other functions of the Secretary in the disposition of power to public bodies and cooperatives in the area.

Because of the foregoing, the Secretary is forced to enter into contracts which fall short of giving full effect to the standards and limitations prescribed by law.[36] In the last analysis, most of the power companies do not enter into wheeling arrangements with the Government; that is, arrangements to transmit power for the Government at a given rate per kilowatt hour. They enter into contracts whereby power is transmitted to the Government's customers through the sale or interchange of power between the Government and the private power companies. The result is that in some contracts the power companies limit the classes of customers to whom they would deliver power, a situation resulting in discrimina-

[36] *Percentage of Power Sold to Preference Customers in Fiscal Year 1951:*

Agency	Sales to Public Bodies and Co-operatives (kwh)	Total Sales (kwh)	Percent
Bur. of Reclamation	3,039,024,883	8,595,471,000	35.4
Bonneville Power Adm'n	3,414,413,000	15,079,236,749	22.6
S. W. Power Adm'n	74,237,622	488,145,365	15.2
S. E. Power Adm'n	*482,880,700	600,822,800	80.4
Total	7,010,556,005	24,763,676,000	28.3

*These are sales of power from the Cumberland basin projects to the TVA.

tion as between Government customers, or in division of territory for rendering service to customers. In practically all such contracts the companies insist on being paid for transmission, not in money, but in power and energy, a situation resulting in giving them *pro tanto* a preference in the disposition of power.[37]

(3) *Planning for Future Customer Loads*

Respondents' argument reflects the Commission's holding that the Secretary has no duty or

[37] Having constructed three transmission lines to the Buggs Island (John H. Kerr) dam, having successfully persuaded the Committees of Congress not to appropriate funds for the construction of lines by Interior, and having successfully persuaded the Corporation Commission of Virginia to deny the application of the Old Dominion Electric Cooperative for the issuance of a note for an REA loan for the construction of a transmission line and a steam plant (86 P. U. R. 129), VEPCO was now in a position to demand that all of the Buggs Island power be sold to it at the bus bar and that it would resell power to preference customers. (House hearings on Interior Department Appropriations for 1953, p. 1569.) SEPA refused to negotiate on this basis. Finally, it negotiated a contract disposing of two-thirds of the power from Buggs Island. Under this contract, VEPCO will receive 123,000 kw. of the dependable capacity of which up to 63,600 kw. will be made available by it for the Government's customers (Ibid. p. 1572). VEPCO will also receive 12,000 kw. of nondependable capacity. This contract has not yet been approved by the Secretary. Obviously, if it is approved (and in the circumstances the Secretary may have no choice in the matter, unless the power is to be wasted) there will be at least as much preference given to VEPCO as to the public bodies and cooperatives in the area. In other words, there will be no preference at all.

responsibility to plan for the future power requirements of the preference customers.[38]

Even if the Secretary's task were no greater than that of a head of an ordinary electric utility, both as to quantity of power to be disposed of and as to the policies to be pursued, it would have been incorrect so to characterize his duties and responsibilities. We cannot conceive of any business-like disposition of power in wholesale quantities which does not require taking into consideration the future power requirements of customers.

In practically all business enterprises, planning for the future is an important element. The business of supplying electric power differs from most other services in that estimates must be constantly made, not only to meet power requirements for years in the future, but also for each particular month in the year and for each hour in any one day. For this reason it is important to have various types of reserves, over and above

[38] This is inherent in the following statement made by the Commission (I, pp. 62–3):

"The Flood Control Act of 1944 does not charge the Secretary of the Interior with the duty or confer authority to provide means to supply *all* power requirements of public bodies and cooperatives, except insofar as it can be done from the surplus power available from constructed Army projects when such preference customers wish to purchase it and are able and willing to take it upon terms which meet the standards prescribed in Section 5 of the said Act; nor is authority found in Section 5 to arrange for or provide new sources of power for new preference customer loads to be developed in the future."

the maximum requirements, and it is important to have interconnections with other sources of supply to take care of emergencies.

In our petition (p. 16) we have referred to the fact that disposition of power in wholesale quantities is effected by means of long-term contracts. This is done because of the ever-present need to meet future power requirements. All the facilities (the generating facilities, the transmission facilities, the distribution facilities, the operating and management personnel, the corporate and financial facilities) must be geared to meet the demand for power at the moment and for the time it is needed. The service must fully respond to the touch of an electric switch throughout the system.

We have also made reference to the fact that in the application of the Federal Power Policy the Secretary must reserve power for future needs of public bodies and cooperatives. We have also referred to the function of public power as a competitive element in the sale of power generally. These considerations alone require that the power needs of present and future customers must be met. The notion that the Secretary has no such duty or responsibility is most unrealistic.

(4) *The Secretary's Responsibility to Advise Congress*

Equally unrealistic and erroneous is the proposition that the Secretary has no duty or respon-

sibility to recommend to Congress the construction of hydroelectric projects [39] (Comm'n., p. 7).

Assuming that such responsibility must be found "in the book", it is clear that it is included in the Flood Control Act of March 1, 1917, 39 Stat. 950, 33 U. S. C. 701 (Pet. p. 59). In that Act Congress, after authorizing the heads of the various departments to assist in examinations and surveys to be made by the Army Engineers, required that "the reports on preliminary examinations hereafter authorized, together with the report of the Board of Engineers for Rivers and Harbors thereon *and the separate report of the representative of any other department,* shall be * * * transmitted by the Secretary of War to the House of Representatives, and are hereby ordered to be printed when so made." (Emphasis supplied.)

Furthermore, under Article II, Section 3 of the Constitution, the President is charged with the responsibility of recommending to Congress "such Measures as he shall judge necessary and expedient". The President acts through the heads of the various departments and, in matters pertaining to power developments, the Secretary

[39] The Commission stated (I, 46): "This function, carried in Section 5 of the Flood Control Act of 1944, has not been extended by Congress to the submittal of recommendations by the Secretary of the Interior to it for the construction of projects serving only the purpose of providing electric power".

of the Interior participates in the execution of this responsibility.

In addition, through an established procedure requiring review by the Bureau of the Budget, the Secretary of the Interior makes recommendations to Congress on all matters affecting his Department, including the submission of bills to Congress on power developments. When legislation pertaining to power development is considered by the Public Works Committee of the House or the Senate, the Chairman of the Committee requests the Secretary to submit his report, and the Secretary thus makes his recommendations to Congress. Likewise, on important matters pending before committees of Congress, the Secretary often appears as a witness and presents the views of the Department. A recent example of such appearance by the Secretary was in connection with the hearings on the St. Lawrence Seaway and Power Project before the Senate Committee on Foreign Relations and before the House Committee on Public Works.[40]

In view of the above, it cannot be said that the Secretary of the Interior is not charged with any responsibility to make recommendations to Con-

[40] See hearings on S. J. Res. 27 and 111, 82d Congress, 1st Session (St. Lawrence Seaway and Power Project), before the Senate Committee on Foreign Relations, pp. (not yet printed); see also hearings on H. J. Res. 2, 3, 4, 15, 102, 122, 159, and H. R. 2536, 82d Congress, 1st Session, before the House Committee on Public Works, pp. 101–132, 163–200.

gress relating to the construction of hydroelectric projects.

For reasons which we cannot understand, Respondents refer to debates in Congress to demonstrate that the Secretary had not been given power to control the construction of hydroelectric projects (Comm'n pp. 7–8), as if the Secretary claimed such power. Of course, he has not asserted any such power either in the proceedings below or in his petition herein. Had he been vested with power to control the construction of hydroelectric projects, there would have been no need for him to appear before the Commission in opposition to VEPCO's application. He appeared before the Commission because he was not endowed with authority to construct or to compel construction of hydroelectric projects. This does not mean, however, that he has no economic interest in the construction of Federal projects, or that, if the Commission erroneously licenses a project site reserved for Federal development, he has no standing to seek judicial review of the order issuing such a license.

(5) *Petitioners' Interests are not contingent or Remote*

Respondents also argue (Comm'n pp. 10, 12, 23, 25) that Petitioners' interests are contingent and remote, because (i) the Secretary's interest does not attach until power from the constructed Federal project becomes available for disposition by him and (ii) the cooperatives' interest does not

attach until the Secretary is able and willing to sell power to them.

(a) The Secretary's Interest

Respondents' argument as to the contingency and remoteness of the Secretary's interest is that the Roanoke Rapids site has not been reserved for Federal construction, and may never be so constructed, and that additional legislation and other steps must take place before he may be able to dispose of power from this project.

We have already shown that the Secretary's interest does not come into being with each particular project as it is constructed. His interest came into being when he was first charged with responsibilities relating to the development of land and water resources. Viewed from the narrower standpoint of the limited problem of disposition of power from Army projects, his interest came into being with the enactment of Section 5 of the Flood Control Act of 1944.

Apart from the fact that the Secretary's interest is not divisible into separate projects or units of projects, Respondents' contention, that his interest is remote, contingent and speculative because the Roanoke Rapids site has not been reserved and may never be constructed as a Federal project, is erroneous for the following reasons:

First. It overlooks the test provided by law for determining when the Government must be

deemed to have entered upon a development (Pet. pp. 6, 26–9).

Second. It assumes that there is no stability of purpose in this type of Congressional legislation. When Congress "adopts" or "approves" a comprehensive river basin plan for Federal development, it must be assumed that such plan will be carried out at such time as Congress will appoint. The integrity of the law must be preserved. Until Congress, by law, withdraws the Roanoke Rapids site from the Congressionally approved comprehensive plan, the 1944 Act must prevail.

Third. It assumes that the proper test of remoteness and contingency is whether additional steps may be interposed before that interest is either annulled or materially injured. Therefore, the respondents argue that before the Secretary will be able to dispose of power from Roanoke Rapids, Congress will have to authorize appropriations for the construction of this project, it will have to appropriate funds for construction, the Army Engineers will have to construct the project; and (the court below added) the Secretary of the Army will have to certify that the power generated is not needed for the operation of the project itself (Pet. pp. 13–14).

This is not a proper test for holding that either the interest or the effect of the Commission's order thereon is contingent or remote. In any case, no matter how substantial the interest or how great the effect thereon, it is possible to set

up such steps, and between any two of them it is possible to set up any number of intermediate steps. The fallacy at the basis of such argument is the assumption that the Secretary's interest does not attach until the power is available for disposition and that until then there is no continuity in his interest.[41] If one recognizes, as one must, that the Secretary has an interest in the development of public power generally, and in the case of flood control projects, from the time investigations are authorized to be made by the Secretary of the Army, as provided in the Act of March 1, 1917 (Pet. pp. 14–15), the entire argument as to the remoteness and contingency of his interest must fall.

Fourth. Inherent in Respondents' argument is the confusion between the interest and the effect of the Commission's order. The two are not coextensive. Rarely is the effect as great as

[41] This is a fallacy akin to the one lying at the basis of Zeno's paradox concerning Achilles and the tortoise, wherein Zeno has thus demonstrated that in a race between Achilles (the fastest runner in Greece) and the tortoise (the slowest of the animals), the former could not catch the latter, no matter how great the handicap given: Suppose that Achilles ran 100 times as fast, and gave the tortoise a handicap of a mile; then, by the time Achilles runs one mile, the tortoise will have advanced 1/100th of a mile; by the time Achilles runs the 1/100th of a mile, the tortoise will have advanced 1/10,000th of a mile, etc. Thus Achilles will always approach the tortoise, but will never catch it. But Achilles does catch the tortoise, and the fallacy in Zeno's reasoning is that he assumes no continuity in the movement of the participants in the race, but disconnected movements from and to the points designated.

the interest. For a party to be "aggrieved," it is not necessary that his entire interest be wiped out. It is sufficient if it is substantially and adversely affected.

Nor are the interest and the effect thereon coterminous. Respondents say, in substance, that the Secretary's interest will not be affected until there is electric power and energy generated at a Federally-constructed Roanoke Rapids project available for distribution, and the Commission's order would make that distribution impossible. The answer is, of course, that if the project site is licensed, there never will be a Federally-constructed Roanoke Rapids project.[42]

Fifth. Respondents' argument begs the question. Petitioners contend that the Commission's order is invalid, because by Section 10 of the Flood Control Act of 1944 the Roanoke Rapids site has been reserved for Federal development, and that the effect of this reservation is to withdraw this site from the licensing jurisdiction of the Commission. For the purpose of determining whether petitioners have standing in court, it must be presumed that this is so (Pet. pp. 24–5).

There is good reason for such presumption. If Respondents are right in their view of Section 10, then they are not prejudiced by a holding that Petitioners are properly before the court. If, on

[42] To use a homely metaphor, it is incorrect to say that a farmer has no interest in his workhorse until it is stolen and the barn doors are locked.

the other hand, Petitioners are right in their view of Section 10, then they would be prejudiced by a holding that they have no standing. For this reason, also, we submit that any reasonable doubt on this question should be resolved in favor of Petitioners.

In this respect, the case at bar differs from the cases on which the respondents rely (Comm. p. 10). For example, in *U. S. Sugar Refiners Ass'n* v. *McNutt,* 138 F. (2d) 116, the petitioners attacked an order of the Food and Drug Administration authorizing canners to use dextrose, or corn syrup, or both, in combination with sugar, without being required so to state on the labels. Assuming the order to be invalid for the precise reasons assigned by them, the petitioners' interest was, nevertheless, speculative and remote. They were neither competitors nor consumers, but merely suppliers of a small ingredient used in the canning process. They could show no adverse effect of the order upon them but, as the Second Circuit held, only a "tenuous likelihood" that "the regulation will do away with the remote, speculative sales resistance of the public to the marketing of the canned fruits sweetened in some part with dextrose or corn syrup which might be present if the labels on the cans disclosed, by naming them, that permitted amounts of one or the other or both sweeteners had been added to the required sugar."

Not so in the case at bar. If it is assumed, as Petitioners contend, that by Section 10 of the Flood Control Act of 1944 Congress did reserve the Roanoke Rapids site for development by the United States, and did withdraw it from the licensing jurisdiction of the Commission, then the Petitioners' interests are immediately and directly affected by the Commission's order.

(b) Cooperatives' Interest

The petitioners, *REA Association, et al.*, have demonstrated that they are "aggrieved" parties, both as competitors of VEPCO and as representatives of consumer groups (Pet. in No. 659, pp. 3–6). Respondents' argument (Com. p. 12), that the interests of these petitioners are further contingent on the ability and willingness of the Secretary to sell power to them, rests on the proposition that they derive their interest solely from the Secretary. If this were so, then their standing in court would depend on the Secretary's standing, and if it were held that the Secretary had no standing in court, then they too would have no standing.

The premise of the argument is erroneous, and so also is the conclusion. It is true that, to the extent that Section 5 of the Flood Control Act of 1944 vests discretionary powers in the Secretary, their ability to purchase power depends on the Secretary's discretion properly exercised. Their *right* to a preference in the purchase of

power, however, is derived, not from the Secretary, but from the statute itself. Furthermore, they do have a right of preference in the purchase of Buggs Island power in accordance with the standards prescribed by law, and this right is adversely affected by the licensing of Roanoke Rapids to VEPCO. Therefore, even if it were held that the Secretary had no standing, such holding would not affect the standing of the REA Association and its member cooperatives.

(6) *The Adverse Effect of the Commission's Order is Direct and Substantial*

There is nothing contingent or remote in the effect of the Commission's order. The Secretary's interest was adversely affected at the moment when the Commission issued a license for Roanoke Rapids, and this adverse effect will continue until the order is set aside. It is sufficient to point out that *right now* the Secretary must sell Buggs Island power at rates greater than with Roanoke Rapids as a project within the Congressionally approved comprehensive plan, and the REA Association must pay such higher rates. Since contracts must be entered into with due consideration for future power requirements, the Secretary must *now* plan on a lesser amount of firm power than would be available if Buggs Island and Roanoke Rapids were coordinated under common ownership and control. Of course,

as has been indicated, this is not the entire effect of the Commission's order.

Nor can it be said that the effect of the order is unsubstantial. Where an applicant for a license seeks to strike at the foundation of public power development, and to disrupt a Congressionally approved comprehensive river basin plan, the entire adverse effect of the Commission's order granting such a license is immeasurably great (Pet. pp. 56–8). One phase of this effect, measurable in money, is the surrender of power benefits over the 50-year period of the license. Whether measured in terms of gross power benefits (approximately $135,000,000), or in terms of net power benefits (in excess of $75,000,000), or in terms of the net benefits less the headwater benefit payments which may be assessed by the Commission ($62,500,000), the effect is substantial enough.

SUMMARY

The United States is the real party petitioner in this case, it is "aggrieved" by the Commission's order, and has standing to obtain a judicial review of that order. Treating the Secretary of the Interior as Petitioner herein, and viewing his interest as limited to matters relating to the disposition of power from Government projects, he has a right, under Section 313 (b) of the Federal Power Act, to vindicate the public interest. His interest is one of great magnitude. He is

charged with the preservation and application of the Federal Power Policy, he must plan for future loads, and he is concerned with future hydroelectric developments in order to effectuate the Federal Power Policy.

Whatever may be one's major premise—whether one favors public or private power development, whether one agrees or disagrees with the Federal Power Policy and the manner in which the Secretary applies it—one cannot disregard the fact that the Secretary's interest is one of an economic nature, that it is substantial, immediate and direct, and that the Commission's order substantially and adversely affects that interest.

CONCLUSION

In view of Respondents' statements in opposition to the petitions filed herein, it is respectfully requested that the Court issue an order (a) granting the writs of certiorari, (b) holding that Petitioners are parties aggrieved by the Commission's order and have standing to seek judicial review of the order, and (c) directing the parties, in their briefs and arguments on the merits, to address themselves to Questions 2 and 3, as set forth in the Petition in No. 658, p. 3, not as restated by Respondents (Comm. pp. 2–3, VEPCO pp. 2–3).

We are authorized to state that Counsel for Petitioners in No. 659, *Virginia REA Association, et al.* v. *Federal Power Commission, et al.*, joins in this brief.

Respectfully submitted.

GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the Relation of Oscar L. Chapman, Secretary of the Interior.

APRIL 1952.

The Secretary of the Interior and the Federal Power Commission are adverse parties in this proceeding, and I am authorizing each to be represented in the Supreme Court by agency counsel.

PHILIP B. PERLMAN,
Solicitor General.